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Supreme Court, U.S.
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No. 87-1096

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT F. WRIGHT, EDWARD L. JACOUBS AND PAMELA GILMORE, TRUSTEE OF THE GILMORE FALMOUTH REALTY TRUST,
APPELLANTS,

v.

ALFRED L. WELCH, III, RAYMOND R. LABOSSIERE, JULIA C. TAYLOR AND JOSEPH COSTA, AS THEY ARE OR WERE MEMBERS OF THE BOARD OF APPEALS OF THE TOWN OF FALMOUTH, MASSACHUSETTS AND PETER GOODALE, AS HE IS THE BUILDING COMMISSIONER OF THE TOWN OF FALMOUTH, MASSACHUSETTS,
APPELLEES.

ON APPEAL FROM THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Appellees' Motion to Dismiss Appeal and Memorandum of Law in Support

GEORGE H. LEBHERZ, JR.*
MUNSON, LEBHERZ & TURKINGTON
Town Hall Square
Falmouth, Massachusetts 02540
(617) 548-6600
**Counsel of Record*

FRANK K. DUFFY, JR.
CAROL A. KENNEY
FARRELL & DUFFY
340 Gifford Street
P.O. Box Q
Falmouth, Massachusetts 02541
(617) 540-4111
Attorneys for Appellees, Falmouth Board of Appeals and Falmouth Building Commissioner

January 28, 1988

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Motion to Dismiss Appeal

Appellees, Board of Appeals of the Town of Falmouth and Building Commissioner of the Town of Falmouth, hereby move this Honorable Court for an Order dismissing the appeal pre-

sented or in the alternative to affirm the Judgment of the Appeals Court of Massachusetts for the reason that this appeal is not within the Court's jurisdiction and that the questions sought to be reviewed were not timely or properly raised below. For grounds, Appellees rely upon the reasons and authorities more fully set out in the Brief of Appellees served contemporaneously herewith.

Respectfully submitted,

GEORGE H. LEBHERZ, JR.
MUNSON, LEBHERZ & TURKINGTON
Town Hall Square
Falmouth, Massachusetts 02540
(617) 548-6600

Dated: January 28, 1988

CERTIFICATION

I hereby certify that a true copy of the within was mailed, postage prepaid, to Richard F. Benway, Esq., Benway & Harrington, 265 Washington Street, Westwood, MA 02090 on this 28th day of January, 1988.

/s/ _____
GEORGE H. LEBHERZ, JR., ESQ.

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APPELLEES.

ON APPEAL FROM THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Appellees' Memorandum of Law in Support of Their Motion to Dismiss Appeal

Statement of the Case

Nature of the Case

This is a zoning appeal pursuant to Massachusetts General Laws c. 40A. Appellants Wright and Jacoubs (hereafter W & J)

appealed to the Barnstable Superior Court after the Building Commissioner denied them building permits and the Falmouth Zoning Board of Appeals upheld the decision of the Building Commissioner.

On March 5, 1973, the case was tried on the following stipulated facts:

1. At some time prior to January 2, 1973, W & J acquired approximately 41.5 acres of land lying off Hatch's Hayway Road in Falmouth, Barnstable County, Massachusetts, hereinafter referred to as "locus".

2. On or about January 2, 1973, W & J filed a preliminary plan of locus with the Falmouth Planning Board and with the Falmouth Town Clerk under the provisions of Massachusetts General Laws c. 41, § 81S, dividing locus into 95 lots.

3. On or about January 3, 1973, locus lay in an Agricultural "C" zone (AGC) under the Falmouth Zoning By-Law and the minimum size for residential lots in such a zone was 15,000 square feet.

4. On or about March 5, 1973, W & J filed a revised preliminary plan of locus with the Falmouth Planning Board and with the Falmouth Town Clerk under the provisions of Massachusetts General Laws c. 41, § 81S, re-dividing locus into 90 lots.

5. On the same day, March 5, 1973, the Falmouth annual town meeting, acting upon Article 39 of the Warrant, voted to amend the Falmouth Zoning By-Law and changed all land in the Town of Falmouth zoned Agricultural "C" zone (AGC) to an Agricultural "B" zone (AGB).

6. The result of the town meeting action increased the minimum size for residential lots from 15,000 square feet to 20,000 square feet.

7. On or about March 29, 1973, the Falmouth Planning Board disapproved the revised preliminary plan, submitted by W & J and referred to in paragraph 4 above.

8. On or about April 25, 1973, the Attorney General approved the zoning amendment adopted March 5, 1973, changing the zoning of locus from AGC to AGB.

9. On or about September 25, 1973, W & J filed a definitive plan of locus with the Falmouth Planning Board and with the Falmouth Town Clerk under the provisions of Massachusetts General Laws c. 41, § 81S, dividing locus into 76 lots. This definitive plan was filed within seven months of the revised preliminary plan referred to in paragraph 7 above, and the minimum lot size in effect on the date of filing of the revised preliminary plan (March 5, 1973), i.e., 15,000 square feet, applied as provided by St. 1957, c. 297 (formerly designated Massachusetts General Laws c. 40A, § 7A).

10. On or about April 16, 1974, the Falmouth Planning Board approved the definitive plan subject to W & J executing an approved developer's covenant as provided in Massachusetts General Laws c. 41, § 81U. Said covenant was executed and filed with the Falmouth Planning Board on September 18, 1974 and thereafter both the approved definitive plan and covenant were filed in the Barnstable County Registry of Deeds (Land Court). Approval of said plan was endorsed thereon on September 18, 1974.

11. On or about September 14, 1981, all 76 lots in the subdivision belonged to W & J, as tenants in common.

12. On or about June 29, 1977, a Falmouth Special Town Meeting, acting upon Article 4 of the Warrant changed the zoning of the locus from an Agricultural "B" zone (AGB) to an Agricultural "A" zone (AGA) and as a result, increased the minimum size for residential lots from 20,000 square feet to 40,000 square feet.

13. On or about September 16, 1977, the Attorney General approved the zoning amendment adopted June 29, 1977, changing the zoning district.

14. During the year 1981, W & J began construction of the ways within the subdivision.

15. On or about September 11, 1981, the Falmouth Planning Board accepted a surety bond from W & J in the amount of $54,582.00 to guaranty that the ways within the subdivision would be finished in accordance with the Planning Board's rules and regulations and released the lots in the subdivision from the covenant referred to in paragraph 10 above.

16. On or about September 15, 1981, W & J, by several deeds recorded in the Barnstable County Registry of Deeds on September 17, 1981, conveyed lots in the subdivision as follows:

a. To Gilmore Falmouth Realty Trust, Lots 2, 5, 7, 10, 14, 17, 20, 24, 27, 30, 32, 35, 42, 47, 50, 53, 56, 66, 71 and 76. See Certificate of Title No. 86794.

b. To Robert F. Wright, Lots 3, 6, 9, 15, 16, 21, 23, 28, 36, 40, 43, 52, 57, 62, 67 and 72. See Certificate of Title No. 86795.

c. To Marathon Realty Trust, Lots 8, 22, 29, 37, 44, 58, 61, 63, 68, 74 and 77. See Certificate of Title No. 86797.

d. To 76 Nominee Trust, Lots 73, 78, 79, 80, 81 and 82. See Certificate of Title No. 86793.

e. To New Swyma Realty Trust, Lots 12, 18, 26, 33, 39, 45, 48, 54, 59, 64 and 69. See Certificate of Title No. 86798.

f. To Edward L. Jacoubs, Lots 1, 4, 11, 13, 19, 25, 31, 34, 38, 41, 46, 49, 51, 55, 60, 65 and 70. See Certificate of Title No. 86796.

17. Sometime in early 1982, Pamela Gilmore, Trustee of Gilmore Realty Trust, owner of Lot 35 within the subdivision, applied to the Falmouth Building Commissioner for a permit to build a single family residence on Lot 35, and the Building Commissioner denied the application. Pursuant to Massachusetts General Laws c. 40A, § 15, the trustee appealed to the

Falmouth Board of Appeals. The Board of Appeals held a public hearing on March 30, 1982. By a decision filed with the Falmouth Town Clerk on June 24, 1982, the Board of Appeals denied the trustee the requested relief.

18. Sometime in early 1983, Robert F. Wright, owner of Lot 72, and Edward L. Jacoubs, owner of Lot 70, applied to the Falmouth Building Commissioner for a permit to build a single family residence on their respective lots, and the Building Commissioner denied their applications. Pursuant to Massachusetts General Laws c. 40A, § 15, both owners appealed to the Falmouth Board of Appeals. The Board of Appeals held a public hearing on May 24, 1983. By a decision filed with the Falmouth Town Clerk on July 8, 1983, the Board of Appeals denied the requested relief.

No other facts were introduced into evidence.

The Superior Court, following a trial de novo, at which no constitutional issues were considered, upheld the decision of the Board of Appeals. The Appeals Court, following an appeal of the Superior Court's Decision by Appellants containing no references in the Notice of Appeal or argument to any federal question, decided to uphold the Decision of the Superior Court.

Thereafter, the Appellants filed an Application for Further Appellate Review to the Supreme Judicial Court of Massachusetts citing and (for the first time) briefing questions regarding the constitutionality of the zoning statute.

The Supreme Judicial Court denied further appellate review and this appeal ensued, originally as an appeal from the decision of the Supreme Judicial Court, and then amended to an appeal of the decision of the Appeals Court of the Commonwealth of Massachusetts.

Argument

I. No Federal Question Is Presented Here and None of the Issues Raised Below Are Significant Enough To Command the Plenary Jurisdiction of This Court.

In an appeal under Massachusetts General Laws c. 40A, § 17, any person aggrieved by a decision of the Board of Appeals may appeal to the Superior Court. No answer is required by the Defendant Board of Appeals. The Court hears all the evidence, determines the facts and decides the relief to be granted to the petitioner. This appeal process is the exclusive remedy for those aggrieved by a Board of Appeals decision and the Superior Court hearing is a trial de novo.

> On appeal to the Superior Court, the judge is required to hear the matter de novo and determine the legal validity of the decision of the board upon the facts found by him . . . [and i]n making his findings, the judge is not allowed to give the board's findings or decision evidentiary weight . . . nor may he make findings which . . . constitute a "mere repetition of statutory words."

Josephs v. *Board of Appeals of Brookline*, 362 Mass. 290, 295, 285 N.E.2d 436, 439 (1972) (citations omitted).

Therefore, a thorough inquiry was launched into the facts of this case at the Superior Court level with separate independent findings by the judge. At no time did the Plaintiff amend his complaint to add an additional count for declaratory judgment or any other relief challenging the validity of the state statutory scheme of the Zoning Enabling Act. The Court decided the case based on state law and without reference to any substantial federal question.

Appellants, in their jurisdictional statement, rely on *Ettor* v. *Tacoma*, 228 U.S. 148, 33 S.Ct. 428 (1913), which has no application here. The facts of *Ettor* concerned the constitutionality under the Fourteenth Amendment of a Washington statute in regard to damages for changing the grade of streets. The fact that, in *Ettor*, the petitioner's property was "damaged for public purposes," referred to an act of the Washington legislature requiring the city of Tacoma to make compensation for consequential damages due to an original street grading. Pending Ettor's action for damages inflicted upon his abutting property in consequence of an original street grading, the provision of the act referred to which expressly required the city to provide for or make compensation for all such damage, was amended so as to provide that the act should not apply to the original grading of any street. *Id.*, 228 U.S. at 154.

This case is distinguishable from the one at bar. In *Ettor* the statute imposed an obligation to compensate abutters injured by an original grading. The remedy, if the city disregarded the obligation, was that afforded by the common law for the breach of any valid contractual or statutory duty. *Id.* at 155. What the Court said in *Ettor* is that if the subsequent repealing statute leaves the party a substantial remedy, the legislature does not exceed its authority. The Court went on to say that this was an action for injury to property actually accomplished before the repeal of the law under which the street was graded which required compensation to be made, and therefore the right to compensation was a vested property right.

In the instant case there was no injury prior to the repeal of the zoning act. The Appellants were not deprived of a vested property right by the passing of the "new" zoning statute. Before the enactment of St. 1975, c. 808, § 3, they had seven years of protection for their subdivision plan. After its enactment, they still had seven years of protection.

Appellants also cite *Coombes* v. *Getz*, 285 U.S. 434, 52 S.Ct. 435 (1932), where a contractual obligation arose between a corporation and its creditors, and the right to enforce it having become vested comes within the protection of both the contract impairment clause in Article 1, § 10 and the due process of law clause in the Fourteenth Amendment of the Federal Constitution. *Id.* at 448.

It is clear that this case has no application here. Zoning regulations are not contracts on the part of the public authorities enacting them in any sense which precludes their subsequent amendment. *Reichelderfer* v. *Quinn*, 287 U.S. 315, 53 S.Ct. 177 (1932).

One who has obtained a building permit or license and has proceeded to act under it has thereby acquired a vested right which is protected against disturbance by a subsequent amendment of the zoning ordinance. *Dobbins* v. *Los Angeles*, 195 U.S. 223, 25 S.Ct. 18 (1904). Here there are no vested rights, since no such attempt was made by Appellants. Indeed their failure to begin road construction until more than six years had elapsed, and to take any action to obtain a building permit within the seven year protected period suggests that the Appellants' dilemma was caused by their own inattention rather than by an amendment to the zoning enabling act by the Massachusetts legislature.

IIA. The Federal Questions Sought To Be Reviewed Here Were Not Properly Raised Below.

A review of the record will show that this attempt to challenge the court's decision based on federal law was not brought before the Appeals Court of the Commonwealth of Massachusetts. In the notice of appeal (Appendix p. 59), summary argument (Appendix p. i) and decision of the Appeals Court (Juris Statement, Appendix p. 2A) no reference was made to the

constitutional question now sought to be presented by Appellants' Amended Joint Notice of Appeal to the court (Appendix p. 11a).

Accordingly, Appellees respectfully submit that, pursuant to Supreme Court Rule 16.1(b), Appellants' failure to timely and properly raise below the federal questions now sought to be reviewed constitutes a sufficient basis upon which to dismiss this appeal.

It is well settled that the prerequisite for jurisdiction for this Court is the presentation of issues below.

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Lynch v. *New York*, 293 U.S. 52, 54, 55 S.Ct. 16, 17 (1934).

The Supreme Court has jurisdiction, if the record shows claim of invalidity of a state statute was fairly and timely presented with fair precision. *New York ex. rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 63 (1928).

IIB. The Questions Presented Are Insubstantial.

In Massachusetts, the new zoning act was adopted by Chapter 808 in 1975.

Appellees argue that the old zoning act, as to subdivisions approved prior to the adoption of c. 808, survived the adoption of c. 808. Their position is that they are governed by § 5A and § 7A of the old zoning act.

In the preamble to c. 808, it is clear that the intent of the legislature was that the act would take effect January 1, 1976, and all zoning ordinances and by-laws must be brought into compliance by June 30, 1978. There is no retroactive deprivation of rights of the Appellants. Under § 7A of the old zoning act, a developer who submitted a preliminary plan before the effective date of a change in the zoning by-law received protection from subsequent changes in the by-law for seven years from the date of endorsement of the plan. After the adoption of c. 808, and with the enactment of the present c. 40A, § 6, the developer has the exact same right of seven year protection.

Appellants also allege loss of substantive rights under the old § 5A. The evidence demonstrated that Appellants did not attempt to exercise their rights until 1981, a full *six years* after § 5A was repealed.

The old 5A provided a method for extending the period a lot could be built upon by conveying lots into separate ownership "while otherwise buildable." The qualifying condition imposed by the statute was that *the lot conform to the zoning at the time of recording* or endorsement, whichever occurs earlier. In this case, where Appellants "checkerboarded" the lots, they did *not* conform to the zoning. At the time of recording, the lots were undersized.

In effect, Appellants are arguing that, for them, the effective date of the 1977 increase in minimum lot size is September 18, 1981. Not so. All land in the town was affected by the increase in minimum lot size. Even though Appellants were protected by the freeze through § 6, the lots did not conform.

Appellants' argument, as set forth in the Jurisdictional Statement, appears to suggest that they are aggrieved by the Massachusetts legislature changing state law and not by any action of the Falmouth Building Commissioner or the Board of Appeals, who are merely interpreting state law.

IIC. The Massachusetts Court of Appeals and the Supreme Judicial Court Interpreted Massachusetts Law in Deciding This Case.

There is no substantial federal question here, because the Appeals Court, in its decision (Appendix p. 6a), said the Petitioners applied for a building permit too late, i.e., after the expiration of the protection period. Both the new and old c. 40A provided the same seven year protection of which they failed to take advantage.

In addition, the court found that even if the old § 5A did apply here, Petitioners could not take advantage of it since they failed to meet the statutory requirement that the lots comply with minimum area requirements at the time of recording. The Appeals Court further found that the new c. 40A, § 6 offered Petitioners no relief, because the attempt to "checkerboard" the lots took place after both zoning changes. New § 6 offers protection for lots in common ownership prior to a zoning change.

The entire case was resolved by the Massachusetts Supreme Judicial Court and by the Appeals Court for the Commonwealth interpreting Massachusetts law, and therefore no federal question arises.

> This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review [in the United States Supreme Court] . . . must show that we have jurisdiction of the case.

Department of Mental Hygiene v. *Kirchner*, 380 U.S. 194, 197, 85 S.Ct. 871, 873 (1965) (footnote omitted).

Conclusion

In view of the previously stated reasons, this appeal must be dismissed and the judgment of the Appeals Court of the Commonwealth of Massachusetts upheld.

Respectfully submitted,

GEORGE H. LEBHERZ, JR.*
MUNSON, LEBHERZ & TURKINGTON
Town Hall Square
Falmouth, Massachusetts 02540
(617) 548-6600

FRANK K. DUFFY, JR.
CAROL A. KENNEY
FARRELL & DUFFY
340 Gifford Street
P.O. Box Q
Falmouth, Massachusetts 02541
(617) 540-4111

Attorneys for Appellees,
Falmouth Board of Appeals and
Falmouth Building Commissioner

**Counsel of Record*

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